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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

GERARD E. BERNE,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 12, 1969.

Citations to Opinions Below

No opinion was rendered by the trial court, the District Court of the Virgin Islands. The opinion of the Circuit Court of Appeals, V.I. , F.2d (3rd Cir. 1969), is printed in Appendix B hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 12, 1969. Appendix B, *infra.* Rehearing was denied on June 12, 1969 (by a vote of 5 to 3). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

A few hours after a reported rape, petitioner was sufficiently identified to the police so that they had no problem in concluding (in the small island community of St. Thomas, Virgin Islands) that petitioner was the alleged rapist, and the investigation immediately focused on him. Two uniformed and armed policemen proceeded to petitioner's home, where he was awakened after only a couple of hours sleep and still feeling the effects of alcohol consumed by him during the preceding hours, and in the presence of his family the police questioned him about the ownership of a yellow M.G. automobile (allegedly used in transporting the rape victim), which he admitted. He was told by the police to go with them to his car, which was parked a short distance away in an airport parking lot. He and the police then went to his car in a police car. At this point a third uniformed and armed policeman drove up in another police car, and petitioner was asked if he had anything in the car which did not belong to him, to which he replied that he did. Asked where it was, he said it was in the trunk of the car. He was told to get it. Thereupon, he opened the trunk and the police obtained the victim's torn dress, girdle and underpants. Petitioner was given no warning at his home or at the time the evidence was removed from his car. The police told petitioner that he was being charged with rape, but did not arrest him at the airport parking lot. They left with the evidence, and a few hours later he was picked up, arrested and taken to the police station. It was after arrival at the police station that the solemn ritual of the *Miranda* warning was performed before further questioning took place. The admissions and items of evidence which had been thus obtained and seized, were later allowed into evidence despite proper pre-trial motion to suppress and proper objections to introduction during the trial. The questions presented are:

1. Whether petitioner was significantly and sufficiently deprived of his freedom of action, or was led to reasonably

believe he was so deprived, so as to be within the custodial intendments of *Miranda*, thereby entitling him to proper warnings.

2. Whether petitioner gave a valid consent to the search of his automobile, or merely submitted or acquiesced to higher authority under surrounding circumstances of pressure and coercion, thereby invalidating the search and seizure as unreasonable.

Additional questions presented are:

3. Whether due process was denied by the failure of the prosecution to inform the defense of the existence and identity of a medical doctor, not produced at trial, who had examined the victim and had made the statement that it was impossible to medically determine whether the victim had been raped, particularly in light of the trial court's refusal to give a missing witness instruction.

4. Whether due process was denied by the giving of the so-called *Allen* or "Dynamite" charge to the jury before it retired.

Constitutional Provisions and Statute Involved

The constitutional provisions involved are Constitution of the United States, Fourth Amendment; and, Constitution of the United States, Fifth Amendment. The statute involved is Act of Congress July 22, 1954, Ch. 558, § 3, 68 Stat. 497; Vol. 1, Virgin Islands Code, pp. 92-94. The constitutional provisions and the pertinent portion of the statute are printed in Appendix A, *infra*.

Statement

In the early morning hours of May 17, 1968, the petitioner and the alleged victim in this case (a tourist) were

on a remote beach in St. Thomas, Virgin Islands. They had been out together in town during the preceding hours. While at the beach something occurred about which there was a complete conflict in their stories. The alleged victim claimed a brutal rape at knifepoint. The petitioner claimed that the alleged victim had sustained the contusions and scratches which were on her body by going into the ocean through a coral reef area, that the matter involved at the most a difficult seduction, and that notwithstanding anything else which may have happened he had never penetrated the alleged victim with his male organ. It developed later at the trial that petitioner's account was substantiated by the fact that none of the medical testimony could establish penetration, that there was no evidence whatsoever of seminal emission, and that the alleged victim had told the police she didn't know what had happened to her when they questioned her about sexual penetration. Following the beach episode the alleged victim returned to her hotel room in disarray where she was confronted by three girl friends who were traveling with her, and at this point she claimed rape.

The circumstances of the following visit of the police at petitioner's home, elicitation of incriminatory statements from him, and search of his automobile, are set forth in the preamble to the Questions Presented, *supra*.

Petitioner was charged with Rape in the First Degree. He was afforded a preliminary hearing, was held over to the District Court of the Virgin Islands, and on June 6, 1968, a one count information was filed in the District Court charging him with Rape in the First Degree. Petitioner entered a plea of not guilty. Several pre-trial motions were filed on his behalf, including a motion to suppress evidence (upon which hearing was held), but all of the motions were denied by the trial court. The petitioner went to trial before a jury on September 18, 1968, and after a four day trial was found guilty as charged.

Included in the pre-trial motions made by the defense was a motion that the prosecution be required to furnish the defense with any evidence favorable to the accused. The court denied the motion and did not enter the order requested, but the prosecution claimed that the point was moot since it had no knowledge of any such evidence. The same motion was renewed during trial. Notwithstanding these things, evidence adduced from prosecution witnesses during the course of the trial showed the following: that there was a certain "Dr. Wilson" who had examined the victim within a couple of hours after the alleged offense; that the police were present in the hotel room of the victim with this doctor; that he was a regularly practicing physician in New York, on vacation and staying at the same hotel as the victim; that this doctor had apparently examined or seen the alleged victim after she returned to New York from the Virgin Islands; that upon pre-trial questioning by a defense investigator a prosecution witness refused to identify this doctor; and, that this doctor had made certain statements highly indicative that he would have been a favorable witness for the defense (*i.e.*, "it is impossible to determine whether there has been penetration"). The doctor was not produced at trial, nor was any attempt made to do so, although it is clear that this was a witness known to the prosecution (the police and the prosecution witnesses), or reasonably could and should have been known to the prosecution. A request by the defense for a missing witness instruction was denied by the court.

In the instruction given by the court to the jury, before it retried to consider its verdict, there was given (over timely and proper objection by the defense), the so-called *Allen* or "Dynamite" charge, as follows (in pertinent part): "You are instructed that if a juror should find himself in the small minority he should ask himself whether the fact that the majority differ with him does not indicate that his own doubt is not a reasonable one or that his conclusions, one way or the other, are not correct."

In due course, the judgment of conviction of the District Court was reviewed by the Court of Appeals for the Third Circuit. The judgment was affirmed, the panel splitting 2-1, a strong dissent being filed by Freedman, C. J. Appendix B, *infra*. The court did not deal at all with the issues relating to the non-disclosure of favorable evidence or the instructions. It did deal at length with the search and seizure issues, concluding that the *Miranda* rule should apply to Fourth Amendment situations, but that the custodial requirements of *Miranda* were not met by the circumstances of this case. Moreover, the court apparently concluded that there was a valid consent to search because of what it felt to be the absence of force or intimidation. Judge Freedman's dissent strongly opposed the majority's views as to the custodial requirements and the absence or presence of coercive factors. Petition for rehearing was denied by a vote of 5 to 3.

Reasons for Granting the Writ

1. The decision below as to issue relating to the absence of proper warnings to petititioner before the elicitation by the police of incriminatory statements and "consent" to search should be reviewed by this Court for the following reasons:

(a) It erroneously interprets and has decided federal questions in conflict with applicable decisions of this Court, *i.e., Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Orozco* v. *Texas* U.S. (1969); and, *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Warnings were not given petitioner before elicitation by police of incriminatory statements and "consent" to search as required by these decisions.

(b) Clearly, the issues presented as to whether the situation in the case at bar comes within the custodial in-

tendments of this Court in *Miranda* and *Orozco* are of importance in the administration of federal criminal justice. Since the rendition of these decisions, federal and state courts have wrestled with the definition of "custody". The decisions are too numerous to cite, and their divergency subject of judicial notice. *Further explication by this Court is urgently needed.* It is believed that the test announced in *People* v. *P.*, 233 N.E.2d 255 (N.Y. 1967) is a proper one, *i.e.*, that *Miranda* warnings must be given when two conditions are met; first, when the individual is deprived of his freedom of action in any significant way or is led to believe he is so deprived, and, second, when the circumstances are likely to affect substantially the individual's will to resist and to compel him to speak when he would not otherwise do so freely. Moreover, since protection from potential police abuse was the goal sought by *Miranda*, the definition of custody should be given a scope more appropriate to the attainment of this goal. This definition should be extended to include police interrogations which are intended to provide evidence for future convictions, *especially in situations wherein the police have every intention of arresting the suspect.* These are important questions of federal law which have not been, but should be, settled by this Court.

(c) There is conflict in courts below as to whether a formal warning by police should be made to a suspect before obtaining a consent to search. It is believed, in accordance with *United States* v. *Blalock*, 255 F. Supp. 268 (1966), that "(T)he Fourth amendment requires no less knowing a waiver than do the Fifth and Sixth." (*Id.* at p. 269). Indeed, the decision in the court below in the case at bar indicates agreement with this concept. As to the existing conflict and confusion of the courts below, see *United States* v. *Blalock, supra; United States* v. *Nikrasch*, 367 F2d 740 (7th Cir. 1966) (suspect cannot consent to a search if he was not advised of his rights under the Fourth Amendment); *Byrd* v. *Lane*, 398 F.2d 750 (7th Cir. 1968)

(wherein 7th Circuit is troubled by its prior decision in *Nikrasch*); *State* v. *Forney*, 157 N.W.2d 403 (Neb. Sup. Ct. 1968) (would not apply the concept until the Supreme Court does); *Gorman* v. *United States*, 380 F.2d 158 (1st Cir. 1967) (*contra to Nikrasch*, but implies that warning should be given in combination with warning or right to silence and to counsel); and, *State* v. *McCarty*, 427 P.2d 616 (Kan. S. Ct. 1967) (declines to be first court to apply rule that *Miranda* applies to search and seizure situations). This is an important question of federal law which has not been, but should be, settled by this Court.

(d) It has erroneously interpreted and decided federal questions in conflict with applicable decisions of this court in that any so-called "consent" to search was invalid as the product of pressure and coercion. *Johnson* v. *United States*, 333 U.S. 10 (1948); *Amos* v. *United States*, 255 U.S. 313 (1921); *Bumper* v. *North Carolina*, — U.S. — (1968).

2. The decision below as to the government's suppression of evidence it knew of, or could and should have known of through the exercise of reasonable, diligence, and which was or probably was favorable to the accused, should be reviewed by this Court for the reason that it decided a federal question in conflict with applicable decisions of this Court. Such was clearly a deprivation of due process within the purview of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). The error became even more pronounced by the failure of the court to give the missing witness instructions requested by the defense, and to which the petitioner was entitled. *United States* v. *Walker Co.*, 152 F.2d 612 (3rd Cir. 1945).

3. The decision below as to the issue of the so-called *Allen* or "Dynamite" charge should be reviewed by this Court. There has been conflict and consternation in the courts below since the rendition of the decision in this Court upon which the controversial charge is based, *Allen* v. *United States*, 164 U.S. 492 (1896). The Fifth Circuit has

struck down this charge when given before the jury retires. *Green* v. *United States,* 309 F.2d 852 (5th Cir. 1962). It has questioned whether the charge should be given at all. *Id.* at 854. See also, *United States* v. *Smith,* 303 F.2d 341 (4th Cir. 1962). In the Second Circuit, on the other hand, the charge has been upheld. *United States* v. *Kahaner,* 317 F.2d 459 (2d Cir. 1963), *cert. den.* 375 U.S. 836 (1963). Cf. *United States* v. *Meisch,* 370 F.2d 768 (3rd Cir. 1966), wherein the Third Circuit recognizes the undesirability of the charge, but upholds it, depending upon the particular circumstances of the case. Amazingly, the Third Circuit, in an opinion rendered June 16, 1969 (just a little over a month since it had ignored petitioner's assignment of error as to the *Allen* charge in the case at bar), has now prospectively directed trial judges in the circuit *not* to give the *Allen* charge, either in the main body of the charge or in the form of a supplement when the jury is having trouble reaching a verdict. *United States* v. *Fioravanti,* No. 17398 (3rd Cir. 1969). The Third Circuit characterizes its action in this respect as ". . . a prophylactic device to eliminate future vexation . . ." (*Id.* at p. 19, slip opinion). The vexation spoken of is not limited to the Third Circuit; neither should be the protection afforded against the dangers and undesirability of the charge. The charge is coercive in nature, and apart from the question whether the charge itself has a tendency to coerce, it lends itself to the impermissible elaboration: "(I)t is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because *the rule is that the majority will have better judgment than the mere minority.*" *Green* v. *United States, supra,* at p. 855. (Emphasis supplied.) See, Moore's Federal Practice, Vol. 8, §31.04; Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge",* 31 U. Chi. L. Rev. 386 (1964). A question is presented which is long overdue for reconsideration by this Court. A situation of conflict and confusion reigns which should be quelled by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Constitutional Provisions and Statute

Constitution of the United States, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Act of Congress, July 22, 1954, Ch. 558, § 3, 68; Stat. 947 (Revised Organic Act of the Virgin Islands of 1954):

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any crimnal cause to give evidence against himself; nor shall any person sit as judge or

magistrate in any case in which he has been engaged as attorney or prosecutor.

The right to be secure against unreasonable searches and seizures shall not be violated.

No warrant for arrest or search shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

APPENDIX B

Opinion In the Court Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17553

GOVERNMENT OF THE VIRGIN ISLANDS

v.

GERARD E. BERNE,

Appellant.

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS AND ST. JOHN.

Argued at Christiansted January 31, 1969
Before: MARIS, FREEDMAN and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 12, 1969)

ALDISERT, *Circuit Judge*

The appellant was convicted by a jury of Rape in the First Degree and sentenced to one year's imprisonment.[1]

[1] The district court ordered the defendant "committed to the custody of the Commissioner of Public Safety, or his authorized representative, for imprisonment for a period of five (5) years." The court also directed, however, that "the execution of sentence is withheld, and the defendant placed on probation for a period of five (5) years, upon condition that he serve one (1) year in jail."

Appendix B

Thirteen separate allegations of error are assigned in this appeal, ranging from assertions that the corpus delicti was not established to charges of prejudicial misconduct by both the trial judge and the Government's attorney. After careful consideration, we have concluded that the only assignment of error which presents a valid and substantial question is the argument that the conviction resulted in part from the admission of certain tangible evidence obtained in violation of the accused's rights under the Fourth Amendment to the United States Constitution.

In the early morning of May 17, 1967, the St. Thomas, Virgin Islands, police were called to the hotel room of a twenty-year-old tourist who stated that she had been raped at knife-point earlier that morning on a nearby beach. She informed the police that her dress and undergarments were in the trunk of the assailant's car. From the victim's description of the assailant and his automobile, the police immediately concluded that Gerard Berne was a prime suspect.

As a result, two uniformed police officers proceeded to the Berne home where they arrived at approximately 7 A.M. According to the testimony of the officers, Berne's mother called her son to the door where the following conversation occurred:

> "I asked him if he had a car and where it was parked and he told me it was parked around by the airport and he took me around there."

The police testified that the following conversation ensued at the airport lot, which was approximately 100 yards from the house:

> "I told him that I had spoken to the young lady at the Caribbean Beach Hotel and she stated that she was out with a person in this particular make car and she described you down to a T, that's the slang, and I asked him did he have any clothes

belonging to this lady and he said 'Yes.' I asked him where it was and he said it was in the trunk of the car and took clothes out of the car and gave me."[2]

With the clothes in hand, the police then proceeded to the station. Berne was not arrested, was not restrained of his freedom in any way, and was permitted to return to his home alone. Later, Berne, in the company of his father, went to the hotel where the victim was staying. While attempting to see her, he was arrested and taken to police headquarters.

Upon arrival at the station, the defendant was advised for the first time of his constitutional rights to counsel and to remain silent, in full compliance with Miranda v. Arizona, 384 U.S. 436 (1966).[3] He then signed a "Warning as to Rights"[4] and voluntarily submitted to further interroga-

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[2] The defendant maintained that the officer physically reached into the trunk and removed the clothing. Accepting this, we do not consider this variance dispositive of the issues involved.

[3] "Before we ask you any questions, we would like to be certain that you know and understand your rights.

"You have a right to remain silent. You have as much right to speak or to answer questions also, but, anything you may say can be used against you in Court.

"You have a right to talk to a lawyer before we ask you any questions. You have a right, too, to have your lawyer with you during questioning. If you want a lawyer, but cannot afford one, a lawyer will be provided for you by a Judge before whom we will take you for that purpose.

"Should you now decide to answer questions without your lawyer present, you will still have the right to stop answering questions at any time you change your mind. You also have the right to stop answering questions at any time until you talk to your lawyer."

[4] "I have read (or have had read to me) the statement telling me of my rights and I now know and understand what my rights are. I am willing to make a statement and to answer questions. I do not want a lawyer. I know and understand what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

tion, during the course of which, he informed the police that there was a hunting knife in his car. At police request, he returned with them to his car and surrendered the knife.

At trial, defense counsel objected to the introduction of the victim's clothes and the accused's knife on the grounds that they were the products of an unconstitutional search and seizure. Specifically, it was alleged that the first interrogation and seizure of the victim's clothes were in violation of the *Miranda* rule and the second seizure of the knife was illegal because the accused had not truly "consented" to the seizure.

The substantive right involved here is the individual's right to be protected against unreasonable searches and seizures. Since the word "unreasonable" is by definition a correlative term, dependent for meaning on attendant circumstances, the Supreme Court has consistently recognized that "each case must be judged on its own particular facts." Lewis v. United States, 385 U.S. 206, 212 (1966). Because both seizures here occurred under significantly different conditions, we will treat the appellant's challenge to the legality of the seizures separately.

First Search

Initially, we reject the government's argument that no "search or seizure" within the meaning of the Fourth Amendment occurred when the defendant voluntarily delivered the evidence to the police. The argument misconstrues the fundamental purpose of the Fourth Amendment, to protect the citizen against unreasonable governmental intrusion. That a person may verbalize an approval to a police request to search or seize does not remove the transaction from the purview of the Fourth Amendment. If such were the case, then the application of the Amendment would depend in large measure on the persuasive powers of the police to extract a "voluntary" consent from the suspect.

Appendix B

There are certain things which consent obviously is not. Clearly, consent is not merely acquiescence to a claim of lawful authority, Bumper v. North Carolina, — U.S. — (1968), nor is it dependent upon any affirmative assertion of rights by the subject. United States v. Rembert, 284 Fed. 996 (D.C. Tex. 1922). Consent must never be equated to non-resistance to police orders or suggestions. Judd v. United States, 190 F.2d 649 (D.C. 1951).

The district court concluded that Berne's consent was freely and voluntarily given. Appellant argues, however, that the absence of coercion, suggestion, duress or intimidation is not enough. Rather, he suggests that a new dimension has been added to the concept of consent in the wake of *Miranda's* holding that:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444.

It is appellant's contention that since his oral consent to the search and seizure was given without prior *Miranda* warnings, the communicative assent cannot be valid.

We recognize that the circumstances presented by this case bring to sharp focus the inter-relationship of the Fourth Amendment's prohibition of unreasonable searches and seizures and the Fifth Amendment's privilege against self-incrimination. As early as 1886, the Supreme Court noted that "the Fourth and Fifth Amendments run almost into each other," and that "compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the

meaning of the Fourth Amendment." Boyd v. United States, 116 U.S. 616, 633 (1886). In Davis v. United States, 328 U.S. 582, 587 (1946), the Court noted that the "law of searches and seizures . . . is the product of the interplay of these two constitutional provisions."

In the years since *Boyd*, the interpretation of the Fourth and Fifth Amendments has undergone considerable refinement. For example, the respective provisions of both amendments have been held applicable to state prosecutions through the 14th Amendment. Malloy v. Hogan, 378 U.S. 1 (1964); Mapp. v. Ohio, 367 U.S. 643 (1961).

The refinement in interpretation has also provided a more precise delineation of the scope of each amendment. Generally, it has been held that the Fifth Amendment applies only to "evidence of a testimonial or communicative nature", whereas "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion." Schmerber v. California, 384 U.S. 757 (1966). As is so often the case, however, the refinement of concepts ironically tends to produce a complexity which creates as many new similarities as differences. In this fissioning process, decisions such as *Miranda* can generate a profound chain-reaction among interdependent concepts.

Thus, there is logical and rational support for the appellant's assertion that the safeguards associated with *Miranda* should also be applied to those situations where the legality of a warrantless search and seizure is justified on the basis of the accused's consent. If the validity of the search is conceived in the communicative assent of the accused, then the vice of self-incrimination is not dissipated because the search produces physical, as opposed to testimonial, evidence. Under such circumstances, the vitality of Fourth Amendment rights are critically dependent on the protective armor of the privilege against self-incrimination.

Appendix B

For the *Miranda* rule to measure the validity of certain "consent" searches, however, the conditions which pertained in *Miranda* must be met. An essential requisite for its application is that the accused be "taken into custody or otherwise deprived of his freedom in any significant way." 384 U.S. at 445. It is only in the context of custody, with its "inherently coercive effect . . . and its consequent deprivation of significant freedom of action," that the *Miranda* warnings are required.[5] Bearing this in mind, we turn to an examination of the events surrounding the first seizure.

In contrast to the situation in *Miranda,* where the accused was interrogated for two hours while being held incommunicado in a police interrogation room, the appellant's dialogue with the police occurred at his home, in the presence of his wife and parents. Unlike *Miranda,* Berne was not "thrust into an unfamiliar atmosphere and run through menacing interrogation procedures". 384 U.S. at 457.

The Court itself went to great lengths in *Miranda* to contrast the environment of the stationhouse with that of the friendly surroundings of the subject's home. Citing from the observations of an experienced criminal investigator, the Court noted:

> "In his home, [the accused] may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." 384 U.S. at 449-50.

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[5] See United States v. Mackiewicz, 401 F.2d 219 (2 Cir. 1968); United States v. Messina, 388 F.2d 393 (2 Cir. 1968); United States v. Maius, 378 F.2d 716 (6 Cir. 1967).

This is not to say that the in-custody requirements of *Miranda* are only to be found within the confines of the stationhouse. See Orozco v. Texas, — U.S. — (decided March 25, 1969). But the mere presence of the police at the subject's home cannot be equated, *per se,* with the deprivation of significant freedom of action with which the Court in *Miranda* dealt. We reject as inaccurate the blanket portrayal of legitimate police investigation in gestapo fashion and refute its underlying presumption that the task of law enforcement is antithetical to the full preservation of constitutional freedom.

In the present case, there was no evidence of the application of force or intimidation, physical or psychological, actual or implied. There was nothing more than a brief inquiry by the police followed immediately by an affirmative response from the subject. This, in turn, was followed by the physical delivery of the evidence to the police. The defendant himself characterized the entire incident as "civil". Considering these factors, we conclude that the appellant was not deprived of his freedom of action in any significant manner and therefore, the application of *Miranda* was not required.

SECOND SEARCH AND SEIZURE

What we have said heretofore regarding the principles governing the legality of the first seizure apply with equal force to the subsequent seizure of the accused's hunting knife. But unlike the first, there is not doubt that the defendant was "in custody" at the time of the second seizure, having been arrested and taken to the station.

The record clearly establishes that upon arrival at police headquarters, the defendant was given a complete *Miranda* warning. He then signed a written "Consent" in which he declared his willingness "to answer questions". It was during the ensuing interrogation that the accused

informed the police of the existence and whereabouts of the hunting knife, and accompanied by the arresting officers, returned to the car to deliver up the knife.[6]

The appellant contends that his "consent" to this second seizure was invalid because, although warned of his right to remain silent and be afforded the assistance of counsel, he was not apprised of his specific right to refuse to deliver the knife and insist that the police obtain a warrant for its seizure. Replying on the concept of waiver as the "intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458 (1938), it is argued that the seizure of the knife without prior Fourth Amendment warning was illegal.[7]

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[6] Under the rule of Preston v. United States, 376 U.S. 364 (1964), this second search cannot be justified as incident to the defendant's lawful arrest. In *Preston*, the Court held: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

[7] The same argument was advanced and rejected by the court in Gorman v. United States, 380 F.2d 158 (1 Cir. 1967). Conceding that the proposition had "surface plausibility" in light of *Miranda*, the court emphasized that the *Miranda* warnings themselves contain an implicit caution that "things which might be found in a search could be used against an accused." In further distinction, the court pointed out that the underlying rationale of *Miranda*, namely, concern over the exclusion of coerced and therefore unreliable testimony, is not presented in the area of search and seizure where the reliability of the evidence is not in issue. The court concluded that:

> "The objective of this policy would seem to have been achieved when police have given the basic *Miranda* warnings, when a defendant subsequently voluntarily submits to an orderly interrogation free from any coerciveness other than that implicit in the fact of arrest and custody, when a straightforward request for permission to search is made, and when an unambiguous and positive response is received." 380 F.2d at 164.

Ostensibly opposed to the *Gorman* ruling is United States v. Nikrasch, 367 F.2d 740 (7 Cir. 1966), where the following language

Appendix B

The appellant's argument is premised on the assumption that the protection of the Fourth Amendment extended to his automobile, irrespective of his own prolix conduct. As such, it misconstrues the very concept on which the Fourth Amendment is based. The Supreme Court has clearly stated that "the Fourth Amendment protects people, not places". Katz v. United States, 389, U.S. 347, 351 (1967). It preserves "the security a man relies upon when he places himself or his property within a constitutionally protected area". Hoffa v. United States, 385 U.S. 293 (1966).

There is no doubt that in protecting personal security the scope of the Fourth Amendment extends to all private areas, be they homes, offices or automobiles. These objects and places, however, are not in themselves the proper subjects for constitutional guarantees. It is the personal privacy and security they represent which is within the protective scope of the Fourth Amendment. In his concurring opinion in *Katz, supra,* Mr. Justice Harlan characterized the rule of the Fourth Amendment in this manner:

> " '[T]he Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here,

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appears: "Since the arrested defendant was then in custody . . . and had not been advised of his Fourth Amendment rights, the trial court correctly observed that no true consent had been given". 367 F.2d at 744. The propriety of this statement, however, has recently been labeled as "dubious" by the same court in Byrd v. Lane, 398 F.2d 750, 755 (7 Cir. 1968).

An intermediate posture was assumed by the Sixth Circuit in Rosenthall v. Henderson, 389 F.2d 514, 516 (6 Cir. 1968), where it was held that "the failure to advise the defendant of his right to withhold consent is only one factor to be considered" in determining the validity of a consensual search.

> the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361.

Thus, it can readily be seen that in any inquiry into the validity of a consensual search or seizure, the behavior of the accused may be a critical factor. For if by his words or actions the accused indicates he does not expect to be afforded the right to security or privacy which the law might otherwise afford, then there is no rational purpose for invoking a rule to create such a right.

Can it reasonably be said that in the case before us the appellant was relying on the security of his automobile when he voluntarily chose to reveal its contents to the police? Having been warned that anything he said could be used against him, it is inconceivable that his election to disclose the existence and location of the knife and to deliver it up to the police was anything less than a free and voluntary abandonment of his security in this otherwise constitutionally protected area.

The appellant's position is less tenable than was the defendant's in Hoffa v. United States, *supra*, where the accused objected to the introduction of his incriminatory statements made in the presence of a secret government informer. The conversations occurred in the defendant's hotel room where the informer had been invited. In rejecting the contention that the use of the informer violated the Fourth Amendment, the Court noted:

> "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a per-

son to whom he voluntarily confides his wrongdoing will not reveal it." 385 U.S. at 301.

At this point it might be appropriate to ask: If the constitution does not protect one who voluntarily confides in another under the mistaken belief that the other will not reveal it, then why should it extend protection to one who reveals information after being expressly warned that it will legally be employed against him?

This case does not present a situation where the police, lacking evidence to sustain a conviction and confronted with an accused who refuses to submit to interrogation, resort to the device of a consensual search to launch their case. In such instance, the failure to advise the suspect of specific Fourth Amendment rights could raise grave questios. (See United States v. Blalock, 255 F.Supp. 268 (E.D. Pa. 1966).

But where, as here, the subject voluntarily submits to interrogation and freely offers information on the existence and location of specifically identified evidence, and further agrees to surrender the evidence to the police, fully cognizant of his right to remain silent and fully aware that the information he provides may be used against him, the seizure of such evidence does not violate the Fourth Amendment. In such a case, the accused, by his words and actions, has abandoned any privacy or security in the location of the evidence. As the Supreme Court emphasized in *Katz:* "What a person knowingly exposes to the public, is not a subject of Fourth Amendment protection."

The conviction will be affirmed.

FREEDMAN, *Circuit Judge,* dissenting:

Our acceptance of the jury's determination of the defendant's guilt should not blind us to the grave constitutional question which his conviction presents.

Two uniformed and armed police officers drove up to defendant's home in a police car at 7 o'clock in the morning.

They had no warrant for his arrest or for a search of his home or automobile, although they probably had sufficient information to justify the issuance of such warrants. At their knock, his mother opened the door, and he came down to meet them when she told him they were inquiring for him. Defendant testified that he had drunk much liquor that night and was still feeling its effect as well as the lack of sleep, for he had returned home only three or four hours earlier. His adventure of the night would alone have left him most unfit to resist the inquiries of the officers.

On the questioning by the police, defendant admitted that he owned a yellow M.G., apparently unique on the Island, and that it was parked at the airport parking lot, less than 100 yards across the street. He then rode in the police car a short distance to his M.G. Another police officer drove up in a police car and joined them as they arrived. The police asked him if he had anything in his automobile that did not belong to him, and he replied that he did. Asked where it was, he said it was in the trunk of his car. He was told to get it. Thereupon he opened the trunk and the police obtained from him the victim's dress, girdle and underpants. According to his testimony, he showed the clothing to the police and they took it; the police testified that he handed it to them.

Defendant was given no warning before the questioning at his home and at the time the physical evidence was secured from his car. He testified that he knew nothing about the requirement for a search warrant; and thought that an officer had an inherent right to search his car. When he finally inquired of the officers "What it was all about", they told him that he was being charged with rape, although they did not place him under arrest. A few hours after the police left him, he was arrested and brought to the police headquarters at the Fort, charged with the offense, and then the solemn ritual of a *Miranda*[1] warning was performed before further questioning took place.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

It seems to me that the police were required to comply with *Miranda* and warn defendant of his right to remain silent and his right to counsel before he answered any of their questions. Such a warning was not given either at his home or at the airport parking lot.

It is said that *Miranda* is inapplicable because this is not a station house interrogation, and defendant met the officers in the familiar surroundings of his home, in the presence of his wife and parents. The Supreme Court has shown, however, in the very recent case of Orozco v. Texas, — U.S. —, decided March 25, 1969, that the true test in an interrogation subsequent to *Miranda* is the nature of the circumstances surrounding the suspect, and that coercive environment may be created even in a defendant's home. There four police officers entered defendant's bedroom, where they questioned him and obtained his incriminating answers. That case differs from this because there the officers admitted that defendant was not free to go where he pleased but was under arrest, although it is not clear that they told him this. Mr. Justice Black said:

> "The State has argued here that since petitioner was interrogated on his own bed, in familiar surroundings, our *Miranda* holding should not apply. It is true that the Court did say in *Miranda* that 'compulsion to speak in the isolated setting of the police station may be greater than in courts or other official investigations where there are often impartial observers to guard against intimidation or trickery.' 384 U.S. 436, 461. . . . According to the officer's testimony, petitioner was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning. The *Miranda* opinion declared that the warnings were required when the person being interrogated was 'in custody at the station *or otherwise deprived of his freedom of action in any way.*' 384 U.S. 436, 477."

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Here there is no evidence that defendant was under arrest at the time of the initial investigation, but he was in the presence of the police and part of the time was surrounded by them in a police car when they drove the short distance to the airport. At his home the circumstances were such that the officers must have been well aware that by their presence he was under the threat that they might any moment mention in the hearing of his parents and his wife, whom he had married less than a year before, that he was being accused of rape. Even if he were completely innocent of rape he would not have wanted his wife to learn that he had been out all night drinking with a female companion. The police therefore must have known that he would be eager to rid his parents and wife of their presence. Indeed, he would probably have preferred to be alone with the police in a station house than to have them at his home.

I therefore believe that since defendant's admissions under police questioning were the product of circumstances which were coercive, he should not have been required to answer any questions without a *Miranda* warning of his Fifth Amendment right to remain silent.

I also believe defendant's Fourth Amendment rights were violated, because his handing over of the incriminating evidence to the police was the result of the same coercive circumstances, without any notice that he was not required to obey their request. Indeed the question whether he had anyone else's clothing in his car was asked when he was in the presence only of the police and had left his home; and if he had refused to answer as the result of a *Miranda* warning, the entire search incident might never have occurred. In my view the principle of *Miranda* is as much applicable to defendant's Fourth Amendment rights as it is to the questioning in his home. It therefore was the duty of the police to advise him that since they had no search warrant, he was not required to produce any evidence which he might

have in his automobile. If it is improper for the police to question a prospective accused under circumstances inherently coercive without giving him a full warning of his rights and affording him an opportunity to obtain legal advice, it is equally improper for them to demand of him the physical evidence indicating his guilt, without giving him notice that he had the right to refuse their demand when they have no warrant.

I therefore believe that the defendant is entitled to a new trial at which there would be excluded from evidence the garments which the police improperly obtained from him without a warrant following questioning at his home without a *Miranda* warning.

I therefore respectfully dissent.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,553

GOVERNMENT OF THE VIRGIN ISLANDS,

v.

GERARD E. BERNE,

Appellant.

(D. C. Criminal No. 72-1968)

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS AND ST. JOHN

Present:

MARIS, FREEDMAN and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed October 1, 1968, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk

May 12, 1969

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No. 332

In the Supreme Court of the United States

OCTOBER TERM, 1969

GERARD E. BERNE, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1969. A petition for rehearing *en banc* was denied on June 12, 1969. The petition for a writ of certiorari was filed on July 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner voluntarily and intelligently consented to a seizure of various articles of clothing in his car.

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2. Whether there was prejudicial error in the giving of an *Allen* instruction prior to the time the jury first retired for deliberation.

3. Whether the government deliberately concealed evidence favorable to the defense.

STATEMENT

After a jury trial in the District Court of the Virgin Islands, petitioner was convicted of rape in the first degree, in violation of 14 V.I.C. 1701(3). He was sentenced to five years' probation, on condition that he serve one year in jail. The court of appeals affirmed, one judge dissenting (Pet. App. B).

The sufficiency of the government's evidence with respect to the commission of the crime is not in dispute. The victim, Miss Walsh, a twenty-year old girl who was on vacation with some friends, testified that she met petitioner at a nightclub in Charlotte Amalie on the evening of May 16, 1968. After agreeing to drive her home, petitioner instead drove to a remote area and began making advances. Miss Walsh got out of the car and ran to a beach where she attempted to elude petitioner by swimming out to sea. Petitioner overtook her and brought her back to the beach. Brandishing a knife, petitioner compelled Miss Walsh to remove her clothing. He then began to have sexual intercourse with her (and achieved penetration) but stopped after a car came by. Petitioner gave Miss Walsh a pair of trousers and a jacket to wear and drove her to her hotel (Tr. 127–170).[1]

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of this Court.

A friend who had been staying with Miss Walsh testified that when she came home she was upset. Upon being asked by another girlfriend whether she had been raped, she replied "yes" (Tr. 274–276). A physician, Dr. Yoon, testified that he was called to the hotel about 5:30 a.m. After examining Miss Walsh he concluded that there was a probability that violence had been inflicted upon her sexual organ but he could not positively say there had been penetration (Tr. 99–103).

Between 5:00 and 6:00 a.m. two police officers went to the Caribbean Beach Hotel where Miss Walsh was staying. After talking with Miss Walsh for about an hour, they proceeded to petitioner's home (Tr. 237–238). The officers arrived there about 7:00 a.m. and were met at the door by petitioner's mother. At their request petitioner was summoned and the officers motioned him aside. They asked where his car was parked. He said it was parked at the airport lot about a hundred yards away, and at their request he accompanied them there in a police car (Tr. 238–239, 247). One of the officers (Norman) told petitioner (Tr. 239–240):

> that [he] had spoken to the young lady at the Caribbean Beach Hotel and she stated that she was out with a person in this particular make car [2] and she described you down to a T, that's the slang, and I asked him did he have any clothes belonging to this young lady and he said, "Yes." I asked him where it was and he said it was in the trunk of the car. He then

[2] Petitioner testified that the car, a yellow MG, was unique on the Island.

went in the trunk of the car and took clothes out of the car and gave me.

Norman denied ordering petitioner to get the clothes (Tr. 247–248). He testified that the officers gave petitioner no warning at that point. Petitioner handed the officers Miss Walsh's town dress, girdle and panties, which were subsequently introduced into evidence at the trial (Tr. 243, 252–253). Thereafter another officer drove up in a police car (Tr. 253–254). Petitioner was not arrested at that time (Tr. 245).[3] Later that morning, around 11:00 a.m., petitioner went with his father to the Caribbean Beach Hotel to try to see Miss Walsh. He was then arrested and taken to the police station. He was informed of his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, and signed a form indicating that he understood them (see Pet. App. B, 5 nn. 3–4). Thereafter petitioner was asked where his knife was located. He replied that it was in his car and offered to take the officer there. Detective Hodge accompanied petitioner to his car. Petitioner gave him the knife (Tr. 62–63, 306), which subsequently was introduced into evidence.

ARGUMENT

1. Petitioner contends that the initial search by the police resulting in the seizure of articles of clothing

[3] Petitioner testified that he had not had much sleep when the officers arrived and was feeling "hazy." He stated that he was *told* by the officers to get Miss Walsh's clothes from the trunk and that they took the clothes after he opened the trunk. He indicated that while on the scene the police advised him that he would be charged with rape. He was unaware that the police could not search his car without a warrant unless he consented and did not wish his car to be searched (Tr. 47–52, 56–59).

of the victim was unlawful because he did not voluntarily and intelligently consent to the search and was not given a warning of his Fourth and Fifth Amendment rights prior thereto. The issue is thoroughly canvassed in the opinion of the majority below, on which we rely. We submit there is no reason for this Court to review the basically factual determination of the majority below that petitioner was not in custody when he accompanied the officers to his car. This finding is the predicate for the court's holding that no *Miranda* or other warnings were required in order to obtain petitioner's valid consent. See *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4), certiorari denied, 392 U.S. 912.

We also point out that the clothing seized in the first search was not critical evidence on the issue of whether a rape had occurred. Petitioner did not deny having Miss Walsh's clothing in his car. He testified that Miss Walsh consented to sexual relations (which did not reach the stage of intercourse) with him on the beach and left her wet clothes in the trunk of his car on the understanding that he would have the torn dress taken to a seamstress the following day (Tr. 571–584). The jury's verdict could thus not have been affected by the introduction of the seized items of clothing.

2. Before the jury initially retired for its deliberations, the trial court gave the following instruction, the second portion of which was objected to:

> You are instructed that every juror is entitled to his own opinion and should not yield to the opinion of other jurors, unless he him-

> self is convinced to a moral certainty that the defendant is guilty of the crimes charged against him.
>
> * * * * * *
>
> You are instructed that it is the duty of each juror to reason with his fellow jurors to the end of joining in the verdict; you are instructed that no juror should refuse to agree from mere pride of opinion; you are instructed that if a juror should find himself in the small minority he should ask himself whether the fact that the majority differ with him does not indicate that his own doubt is not a reasonable one or that his conclusions, one way or the other, are not correct [Tr. 756, 760–761].

This instruction was based on this court's decision in *Allen* v. *United States*, 164 U.S. 492; see *Kawakita* v. *United States*, 343 U.S. 717, 744 (where the Court found an *Allen* charge claim, *inter alia*, "either insubstantial or so adequately disposed of by the Court of Appeals that we give [it] no notice"; see, for the opinion below, 190 F. 2d 506, 521–528 (C.A. 9)). The courts of appeals until recently also were unanimous in approving such instructions. See *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934 and cases cited. Since in those cases the courts have held that the giving of such a charge is not coercive when the jury is deadlocked, then *a fortiori* such a charge is not coercive where given as part of the court's general instructions.

The Third Circuit has recently held, in the exercise of its supervisory powers, that it will no longer con-

tinue to approve the typical *Allen* charge. *United States* v. *Fioravanti*, No. 17398, decided June 16, 1969, petition for a writ of certiorari pending *sub nom. Panaccione* v. *United States*, No. 333, this Term. A similar rule has been adopted in the Seventh Circuit in *United States* v. *Brown*, No. 16772, decided June 6, 1969, petition for a writ of certiorari filed, No. 551 Misc., this Term. In both *Fioravanti* and *Brown*, however, the courts did not find the giving of the *Allen* charge to require reversal of the conviction. There is thus no inconsistency in the decisions of the Third Circuit and no conflict of decisions.

3. Petitioner also contends that the government violated *Brady* v. *Maryland*, 373 U.S. 83, by deliberately concealing evidence favorable to the defense. Specifically the claim is that the government wilfully failed to inform the defense of the existence and identity of a doctor, not produced at trial, who had examined Miss Walsh and made the statement that it was impossible to determine whether she had been raped (Pet. 3). At the trial, Miss Anderson (a friend of the victim) and Miss Walsh testified that a Doctor Wilson from Long Island made an examination of Miss Walsh immediately after that made by Dr. Yoon (Tr. 222–223, 287). Dr. Wilson told Miss Walsh that it was "more likely" than not that she had been raped, but he was "not sure" (Tr. 223). Miss Anderson testified that Dr. Wilson never told her that it was impossible to determine whether Miss Walsh had been raped (Tr. 285–286). She indicated,

however, that Dr. Wilson was in Miss Walsh's room for some part of the time while the police were there (Tr. 287–288).

Petitioner introduced testimony of a defense investigator that he had spoken with Miss Anderson in New York. She told him that she was in the room when Dr. Wilson made his examination, and that the doctor had stated that it was impossible to determine whether there had been penetration (Tr. 649).

The above facts are insufficient to establish any violation of a duty of disclosure by the prosecution. There was no showing made that the prosecution ever knew of Dr. Wilson or his opinion (see Tr. 32–33). The police apparently did not report his existence. Detective Hodge, who was told by one of the girls at the hotel that Miss Walsh had been examined by another doctor, made no attempt to ascertain the other doctor's identity (Tr. 320). Dr. Wilson's testimony at most would have been corrobative of that of Dr. Yoon, who testified that he could not determine with certainty whether penetration had occurred (see *infra*, p. 3).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1969.

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IN THE

Supreme Court of the United States

October Term, 1969.

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GERARD E. BERNE,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

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GOVERNMENT OF THE VIRGIN ISLANDS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

Petitioner presents his petition for a rehearing of this Court's order dated October 13, 1969, denying the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and in support thereof, respectfully shows:

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Since the filing of the petition herein four federal circuit court rulings have come to light which deal with one of the issues presented in the petition, *i.e.*, the giving of the controversial *Allen* or "Dynamite" charge. These decisions amount to intervening circumstances of substantial effect within the contemplation of Rule 58 of the Rules of this Court.

On July 8, 1969, the Ninth Circuit, in not finding reversible error in the giving of the *Allen* charge, stated, "We doubt that it is really any longer advisable to give the *Allen* instruction at all, and it certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted." *Sullivan v. United States*, No. 22,193. On July 17, 1969, and on August 27, 1969, the Fifth Circuit approved the charge in two cases before it, thus expanding on that circuit's approval under some circumstances and disapproval under others. *Posey v. United States*, No. 25,654, and *Sanders v. United States*, No. 25,043. On August 27, 1969, the Eighth Circuit held that the charge passes muster, but points out that because of "increasingly frequent" attacks on the *Allen* charge, the district courts of the circuit must exercise care in giving the charge. *United States v. Pope*, No. 19,408.

Thus, the situation of conflict and confusion among the circuits is broadened. This is especially so because of the

holdings of the Third and Seventh Circuits that the typical *Allen* charge will no longer be approved. *United States v. Fioravanti*, No. 17,398, and *United States v. Brown*, No. 16,772, decided June 16, 1969, and June 6, 1969, respectively. Although the Third and Seventh Circuits found no reversible error in these particular cases, they have served notice that giving the charge in the future will be reversible error. The conflict is manifest. Unless the conflict is resolved, an unjustifiable discrimination between defendants in different jurisdictions will result.

2. The petitioner herewith submits within the contemplation of Rule 58 another substantial ground available to petitioner although not previously presented.

Before the trial, defense counsel filed an affidavit establishing that prior to trial counsel had been informed that detectives would not discuss the case with him by reason of a standing order of the Chief of the Investigation Bureau prohibiting the detectives from discussing any criminal case with counsel. The affidavit was never controverted. The defense made an appropriate pre-trial motion for the court to issue a rule to show cause why the information should not be dismissed for these reasons. The motion was denied. Moreover, the court refused to direct the officers that they had a right to discuss the case with counsel if they wished. Inasmuch as the Chief of the Investigation Bureau is an important arm of the prosecution, this was tantamount to situations wherein a prosecutor directs prosecution witnesses that they may not discuss with defense counsel cases in which they are involved. The error in this is manifest. And, even if one argues that each witness may decide for himself whether he chooses to talk with defense counsel, *the important point is that each witness should have that choice left to himself.* He should not be squelched by an official pronouncement or policy of the prosecution or of any arm of the prosecution. There is no

tenable reason why police officers or detectives should be excluded from such a reasonable rule.

Witnesses do not belong to one party to a litigation. Counsel has a right to interview any witness or prospective witness who may have information pertinent to his client's case. *Canon 39, Canons of Professional Ethics.* Instructions by one in charge of any phase of the prosecution that witnesses should not talk to the defense (or that they may talk only in the presence of that person in charge, or only with that person's consent) are quite impermissible, indeed, unconstitutional. See *Gregory v. United States,* 369 F. 2d 185 (D. C. Cir., 1966); *United States v. Enloe,* 15 U. S. C. M. A. 256, 35 C. M. R. 228 (1965), and cases cited.

The American Law Institute and the American Bar Association Joint Committee have recently released the *Trial Manual For The Defense Of Criminal Cases* (1967). This major undertaking, consisting of two large volumes, was prepared as a project of these organizations together with the National Defender Project of the National Legal Aid and Defender Association, and is designed to give counsel guidance in the proper representation of criminal defendants. It has been prepared under the guidance of an advisory committee and consultants consisting of leading federal and state judges, prosecutors, defense attorneys, educators, etc. This manual, at Sec. 118, p. 2-83, states that under circumstances wherein witnesses have been instructed not to talk with defense counsel, counsel should move the court for a rule to show cause (a) why the charges against the client should not be dismissed with prejudice, on the ground that there has been unconstitutional interference with the preparation of the defense, and that there is no way of knowing how much harm has been done, or of setting it right at this stage; or, at least, (b) why the prosecution should not be ordered to identify all witnesses to whom such instructions have been given, so they can all be brought before the court and instructed by the court that

they are free to speak to the defense. Moreover, the foregoing *Manual* proposes that by analogy from the cases cited hereinabove, and from *Curran v. Delaware*, 259 F. 2d 707 (3rd Cir., 1958), counsel should seek a judicial order compelling uncooperative officers to tell counsel what they know (even where their unwillingness to talk to counsel is not referable to the prosecutor), on the ground that a policeman, like the prosecutor himself, is a state official and is forbidden to suppress anything helpful to the defense.

All of this was presented to the trial court, and notwithstanding the infinite fairness of the request the court denied the motion out of hand. As previously suggested, this amounted to an unconstitutional interference with the preparation of the defense, and there is no way of knowing how much harm has been done. However, one example of the harm which was visited upon defendant in the case at bar by reason of the silence of the police was the non-disclosure of a doctor who had examined the prosecutrix and had reportedly stated that it was impossible to determine whether she had been raped. As stated in respondent's brief herein (at p. 8), "The police apparently did not report his existence." Such witness, if known to the defense prior to trial, could well have been most important to the defense if produced in court. Whether or not the inability of the defense to produce this witness was harmful, the point is that to this day it is impossible to determine how much harm resulted from the impermissible denial of the authorities to allow defendant to adequately prepare his case.

We urge upon the Court the proposition that the foregoing error presents an important question of federal law which should be settled, and the circuit court's refusal to reverse on this ground has sanctioned a departure from the accepted and usual course of judicial proceedings which is serious enough to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorai issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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